

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-14835

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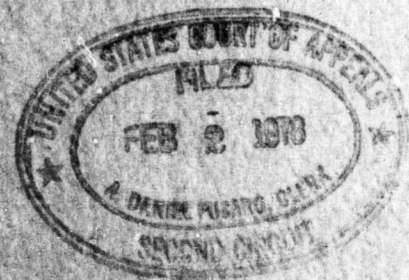
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES v. VINCENT BROWN, a/k/a
Richard Glover, GEORGE NICHOLAS, a/k/a
Jerome Richardson

B R I E F

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COURT BELOW: U.S. DIST. CT., SOUTHERN
DISTRICT OF NEW YORK



UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA)

vs.)

Docket Number: 77-1485

VINCENT BROWN, a/k/a Richard)
Glover, GEORGE NICHOLAS, a/k/a)
Jerome Richardson)

BRIEF OF APPELLANT, VINCENT BROWN

Respectfully submitted,

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Now comes the Appellant, Vincent Brown, in the above-entitled case, and files this brief following his conviction in the United States District Court for the Southern District of New York before United States District Court Judge Charles E. Stewart, Jr.

The Defendant-Appellant hereby also incorporates by reference in this brief any points briefed by Alan Stim, Esquire representing the Co-Defendant, GEORGE NICHOLAS, a/k/a Jerome Richardson.

STATEMENT OF FACTS

The Appellant was arrested on May 1, 1973 in the area of 74th Street between Amsterdam Avenue and Broadway in the early morning hours. At the time, the Defendant was in the company of the Co-Defendant, George Nicholas, and James Brown who is not a Co-Defendant in the instant case. A detective, Francis Kollman, of the New York City Police Department Auto Crime Unit testified that he was on duty at the time and place aforesaid, and that his attention was drawn to a 1969 Lincoln Continental with Rhode Island license plates, BH 266, parked empty by the curb.

The officer testified that he was attracted to

the automobile because it had Rhode Island plates and he was aware of the fact that it was an easy matter to register a vehicle in Rhode Island, and the only thing necessary was a Bill of Sale. The officer further testified that he looked through the windshield of the car and copied down its identification number which was on the dashboard, to wit VIN Number 9Y82A873470. He then checked with the National Crime Information Center and was informed that the automobile had been reported stolen in Boston, Massachusetts about a month before. The detective further testified that he kept the vehicle under surveillance for over an hour, and finally observed three (3) men enter the vehicle and drive off.

The detective and his partners followed the vehicle, stopped it a short distance later and placed the three (3) occupants of the vehicle under arrest. The three (3) occupants of the vehicle were then transferred to the Twentieth Precinct and the vehicle was transported by another police officer. The vehicle was placed in the police parking lot adjacent to the Precinct. (RA p. 13) The officer further described the parking lot as being an enclosed parking lot attached to the Precinct property and it has a gas tank where the radio cars fill up with gas. He further testified that there are police officers contin-

uously going through this lot, and they have a gas attendant who is assigned to the parking lot to work the gas pump. (RA p. 14) The officer further testified that he made an inventory search of the vehicle and found a shaving kit which was on the floor of the front of the passenger seat which he opened and found fifty (50) Twenty Dollar bills with the same serial numbers. (RA p. 15) The Appellant was charged with possession of stolen property and unauthorized use of a motor vehicle under the Penal Law Sections of the New York State Penal Code. The Appellant and his Co-Defendant-Appellant were turned over to the Secret Service for further investigation pertaining to the counterfeit Federal Reserve notes. The officer also testified that the parking lot was fenced and able to be locked. (RA p. 28) The officer also testified that the shaving kit was closed and zipped and it was necessary for him to unzip it to see what was inside, and that he did not obtain a search warrant prior to opening said shaving kit. (RA p. 29, 30) Subsequent to the Appellants being turned over to the Secret Service agents, and after his Co-Defendant-Appellant made certain incriminating statements, the Defendant-Appellant also made certain statements to the Government and agreed to cooperate with the Govern-

ment in attempting to locate the plates from which the counterfeit was made. Appellant also contends that he met with Mr. Nicholas Figueroa, who was then an Assistant U.S. Attorney who also agreed that if the Appellant cooperated with the authorities, he would not be prosecuted in connection with this case. Based on these assurances, Defendant-Appellant gave certain information to the Secret Service and in fact cooperated with the Secret Service and was immediately thereafter released with his Co-Defendant-Appellant, flown back to the State of Rhode Island at the Government's expense, where the cooperation with the authorities took place. (RA pp.265 - 274) The record also indicates that although this arrest took place on May 1, 1973 the first hearing in connection with this case did not take place until September 6, 1977, this being true even though the Appellant's whereabouts were known to the prosecution inasmuch as he had been arrested in the State of Rhode Island and had made appearances voluntarily in the office of the then prosecutor, Assistant United States Attorney Nicholas Figueroa, was represented by counsel and in fact his new counsel, Alton W. Wiley, had made appearances in his behalf at the office of the United States Attorney for the Southern District of New York. In spite of all these matters, the first hearing

was held some four years and four months after the initial arrest. (RA. pp. 163, 164, 165, 167, 187, 189)

At the time of his sentencing the Appellant attempted to retract his former plea of guilty and enter a plea of not guilty and reinstate the matter for trial. See copy of motion in connection therewith (RA. Ex. A) Said motion was denied, the transcript from said hearing having not been received as yet, the Record Appendix does not contain information pertaining to this proceeding.

ISSUED PRESENTED

I. DID THE COURT ERR IN DENYING THE APPELLANT'S MOTION TO SUPPRESS THE PHYSICAL EVIDENCE, TO WIT THE COUNTERFEIT FEDERAL RESERVE NOTES, AND ALSO THE STATEMENTS ALLEGEDLY MADE BY THE APPELLANTS?

II. DID THE COURT ERR IN NOT DISMISSING THE INDICTMENT FOR FAILURE OF THE GOVERNMENT TO COMPLY WITH THE REQUIREMENTS OF TITLE 18 UNITED STATES CODE, 3161?

III. DID THE COURT ERR IN NOT ALLOWING THE APPELLANT TO WITHDRAW HIS GUILTY PLEA AND PERSIST IN HIS NOT GUILTY PLEA AND REINSTATE THE CASE FOR TRIAL?

I. DID THE COURT ERR IN DENYING THE APPELLANT'S
MOTION TO SUPPRESS THE PHYSICAL EVIDENCE, TO WIT THE
COUNTERFEIT FEDERAL RESERVE NOTES, AND ALSO THE STATEMENTS
ALLEGEDLY MADE BY THE APPELLANTS?

It is the Appellant's contention that the evidence should have been suppressed, and the evidence to which the Appellant refers being two-fold, to wit the counterfeit Federal Reserve notes which were found in the shaving kit and the incriminating statements given by the Appellant to the Secret Service agent.

As to the counterfeit Federal Reserve notes, these should have been suppressed in accordance with the decision of the United States Supreme Court in the case of U.S. v. Chadwick, 97 Supr. Ct. 2476, 53 L.Ed. 2d., 538, which case is directly in point. In that case the suppression order was sustained with regard to a footlocker that was in the trunk of an automobile at the time the defendants were arrested, but which was not searched or inspected until approximately an hour later at the impound area of the Federal Building without the benefit of a search warrant. After stressing the fact that the Fourth Amendment was intended to protect individuals, the Supreme Court went on to state at 97 Supr. Ct. 2485, as follows:

"Here the search was conducted more than an hour after Federal Agents had gained exclusive control of the footlocker and long after the Respondents were securely in custody. The search therefore cannot be viewed as incidental to the arrest or justified by any other exigency. Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view, when no exigency is shown to support the need for an intermediate search, the warrant clause places the line at the point where the property to be searched comes under the exclusive dominion of the police authority. Respondents were therefore entitled to the protection of the warrant clause with the evaluation of a neutral magistrate before their privacy interests in the contents of the footlocker were invaded. Accordingly, the judgment is affirmed."

In the instant case, it is on all fours with the Chadwick decision. In the instant case police had custody of the three individuals who were in the car and they were safely incarcerated. Thereafter, the police already had custody of the vehicle, took it upon themselves to remove a shaving kit from the vehicle. This the police are attempting to justify as an inventory search. However, it should be further noted as stated in the Statement of Facts that the shaving kit was zippered and hereafter the police took it upon themselves to unzipper the shaving kit to determine what it contained. It is the Appellant's

argument that this was merely a subterfuge and an attempt to satisfy the curiosity of the arresting officer or to determine whether or not there was in fact any contraband therein. The police officers had absolutely no information or no reason to believe there was anything in the shaving kit other than articles normally contained therein. There was no evidence that there were any explosives of any kind or other material which could be harmful to the health and safety of the police officers or anyone else in the immediate environs.

The Government alleges that the search was legitimate as an inventory search as allowed by cases such as South Dakota v. Opperman, 428 U.S. 364, 96 Supr. Ct. 3092, 49 L.Ed.2d 1000 (1976). It is the contention of the Appellant that the Opperman case is clearly factually distinguishable from the case at bar.

In the Opperman case the vehicle was towed from the streets by the police department due to multiple parking violations. At the time of its being towed, the owner was neither present nor is there any indication that he knew the vehicle was being towed. Another distinction is that in Opperman there were valuables, including a watch in plain view of the officers. Another distinguishing feature is

that in Opperman the testimony was that the vehicle was impounded in a lot which was the old county highway yard which had a wooden fence partially around part of it which was further described as a kind of dilapidated wire fence - a make-shift fence. (emphasis added) Furthermore, there was testimony in Opperman that there had been incidents of vandalism in connection with cars stored on this lot. The testimony is uncontradicted in the instant case that the lot in question was surrounded by a fence and had a gate which could be locked and was frequented by police officers coming and going. Additionally there was a gas attendant on duty on the premises. As previously stated, the defendant in Opperman was not present at the time the vehicle was towed which means there was no possibility for the police to return any of his valuables to him. In the instant case the defendants, who were the occupants of the car, were all in police custody and it would have been a simple matter for the police to ascertain from the defendants who the owner of the shaving kit was and tag or seal same in his presence and return it to him upon his release on bail or upon his incarceration while awaiting trial.

In the instant case the defendant(s) had a right to assume that the contents of the shaving kit would be

secure from unreasonable intrusions from members of the public or law enforcement officers. It should further be noted that there is no testimony that the police felt that the shaving kit contained either explosives or items which would be perishable or which would deteriorate which would make it necessary for them to open said shaving kit. Therefore, it is the contention of the Appellant that the initial seizure of the shaving kit was a violation of his rights under the Fourth Amendment to the Constitution of the United States as there was no probable cause to believe that the shaving kit contained contraband. Probable cause is necessary with the same standard as to the search of one's home or office. See Chambers v. Maroney, 399 U.S. 212, 90 Supr. Ct._____, 26 L.Ed.2d 419 (1975) and Carroll v. United States, 267 U.S. 132, 45 Supr. Ct. 280, 69 L.Ed. 543 (1925). It is further the Appellant's contention that the unlawful search was further compounded by the opening of the shaving kit without either probable cause or exigent circumstances.

In the instant case, if the police were actually interested in merely safeguarding the valuable, it would have been an easy matter for them to either tag the shaving kit or seal it in the presence of the defendants and place it in their property room and return same to the Appellant after his arraignment.

As to the Question of the Voluntariness
of the Statements Given by the Appellant

The Government claims that all of the Miranda warnings were given, thus this successfully meets the criteria for the statements being admissible in evidence. The Appellant, Vincent Brown, is not contesting whether or not the Miranda rights were given but is contesting the question as to whether or not the statements given were voluntary. It is his contention that the question of voluntariness is a subjective test. In the instant case all of the testimony and all of the evidence points to the fact that the cooperation of the Appellant with the authorities was for the express purpose and with the express subjective feeling on his part that there would be no prosecution of him. This being the case, the statements given in furtherance of this cooperation with the police could certainly not be considered as involuntary.

II. DID THE COURT ERR IN NOT DISMISSING THE
INDICTMENT FOR FAILURE OF THE GOVERNMENT TO COMPLY WITH
THE REQUIREMENTS OF TITLE 18 UNITED STATES CODE 3161?

The Appellant contends that his right to a speedy trial was denied and further contends that his right to a speedy trial was denied at the behest of the Government inasmuch as the Government, in seeking his cooperation, purposely delayed said trial.

Defendant was arrested on May 1, 1973. Thereafter, as has been previously shown, he was flown at Government expense to the State of Rhode Island to assist the prosecution in attempting to locate the plates used to make the counterfeit Federal Reserve notes. Title 18, United States Code, Sec. 3161 (c) provides as follows:

"The arraignment of a defendant charged with an information or indictment with the commission of an offense shall be held within ten days from the filing date (in making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. Thereafter, where a plea of not guilty is entered, the trial of the defendant shall commence within sixty days from the arraignment on the information or indictment at such place within the district as fixed by the appropriate judicial officer."

In the instant case, this provision of Title 18 was flagrantly violated. The court below has indicated

that the Defendant-Appellant's right to a speedy trial was waived due to his unavailability. The Appellant would respectfully point out to the court that John Curley, who was called as a Government witness at the suppression hearing, who was a Legal Aid attorney for the Appellant at the time of his arraignment testified inter alia as follows:

"I have a reference to August 8th - withdrawn; August 12, 1974. A lengthy conversation with Mr. Brown and his wife and Assistant United States Attorney Nicholas Figueroa.

THE COURT: What was the date of that?

THE WITNESS: August 12th.

THE COURT: '73?

THE WITNESS: '74." (RA p. 187)

It is uncontradicted therefore that not only did the Government know of the Defendant's whereabouts but the Assistant United States Attorney was involved with a conference with him in August of 1974, a period of one year and four months after his arrest on the charges stated herein. Again, on Record Appendix p. 188, Mr. Curley testified as follows:

"On June 13th or 14th, or possibly the 17th, the defendant Vincent Brown came into Room 106 without appointment. I was on trial at that time and the defendant said he was aware of that, but he just wanted to speak to me, and then proceeded to appointment with Nick Figueroa. I called Figueroa and was advised that he was aware the defendant was in town and wanted to see him. He said that he would see the defendant but that he would want a witness present, probably somebody from his office.

I advised him the defendant indicated that the indictment was a mistake, and Mr. Figueroa again repeated that there was no mistake and that the defendant had been told he would be indicted."

The record is replete with attempts by the defendant to meet with the prosecution to have his case disposed of. Further, in 1976 the defendant was arrested in the State of Rhode Island and brought before a magistrate of the United States District Court for the District of Rhode Island. Attempts were made to resolve this matter under Rule 20 proceedings in Rhode Island. Copies of the order specifying methods and conditions of the release are attached hereto as well as a copy of a letter from Michael S. Devorkin, Assistant United States Attorney addressed to Robert L. Gammell, Esquire, Assistant United States Attorney for the District of Rhode Island pertaining to these proceedings. These are marked "Exhibits B, C and D". This further indicates that the Government was aware of the whereabouts of the Appellant during the year 1976 and took no steps to bring him to trial.

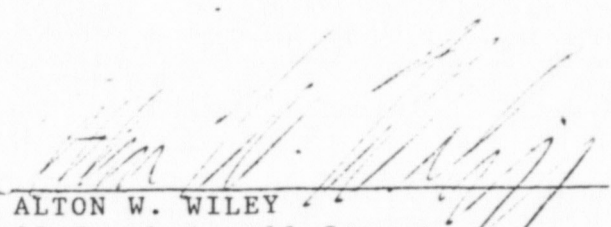
III. DID THE COURT ERR IN NOT ALLOWING THE APPELLANT
TO WITHDRAW HIS GUILTY PLEA AND PERSIST IN HIS NOT GUILTY
PLEA AND REINSTATE THE CASE FOR TRIAL?

On November 3, 1977 the Appellant appeared before the Honorable Charles Stewart, United States District Court for the Southern District of New York for sentencing. Prior thereto, the Defendant had filed three motions before the said court. The motions were to allow the defendant to retract his plea of guilty, enter a plea of not guilty and reinstate the matter for trial, the grounds therefor being that Defendant's counsel, being relatively new to the case and having the logistical problems of travel between Rhode Island and New York City, a distance of approximately 200 miles, had not had adequate time to prepare for trial. The two further motions were that the Honorable Charles Stewart should disqualify himself from hearing the case inasmuch as he had made adverse rulings pertaining to the motion to suppress as well as violations of defendant's rights under 18 U.S.C. Title 3161, and further, that the counsel for the defendant be given adequate time to prepare his defense. The trial justice denied the motion to withdraw the guilty plea and reinstate the case for trial, therefore making it unnecessary for him to rule on the remaining two motions. As of the date of

the filing of this brief, the transcript from said hearing has not been received. The Appellant is desirous of briefing this point, but needs the transcript from said hearing. Appellant would ask that additional time be given to brief and file the Record Appendix in connection with said motions.

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